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NO._____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1982

ESCAMBIA RIVER
ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION
and GULF POWER COMPANY,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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April 13, 1983

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Appellee, Florida Public Service Commission, respectfully moves to dismiss or affirm the judgment of the Florida Supreme Court in this case on the ground that the question is so unsubstantial as not to warrant further argument.

The jurisdictional statement filed by Appellant fully sets forth the opinions below, the jurisdiction and the constitutional and statutory provisions involved. Those matters need not be repeated here.

QUESTIONS PRESENTED

1. May a state resolve a territorial dispute involving a large industrial customer in favor of an investor owned utility rather than a rural electric cooperative on the basis of a policy that when all relevant

factors, including those enumerated in its statutes are equal, the investor owned utility should be granted the authority to provide service?

2. Is such policy founded on a rational state regulatory basis that comports with the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

On July 6, 1981 Appellant, Escambia River Electric Cooperative (Escambia), filed a petition with Appellee, Florida Public Service Commission (Commission), seeking to prevent Appellee, Gulf Power Company (Gulf), from extending its electrical transmission lines into what Escambia considered its territory. Gulf filed a response to the petition

and requested an expedited hearing. A hearing was held by the Commission on July 16, 1981 during which evidence and argument were heard on the issues presented. The Commission announced its decision in favor of Gulf at the close of the hearing. An order setting forth findings of fact and conclusions of law was issued on July 31, 1981. The facts leading to the Commission's decision may be fairly summarized as follows:

On May 28, 1980 Exxon U.S.A. asked Gulf for a proposal to provide 115 KV service to an area known as the Blackjack Creek site (Tr. 175).[1] In mid February 1981 Exxon U.S.A. and

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[1]References to the transcript of the Commission hearing are designated "Tr." followed by the page number.

Escambia began discussions relating to the provision of service to the site by Escambia (Tr. 33). Exxon U.S.A. and Air Products, Inc., formally requested 115 KV service from Gulf for the Blackjack Creek site by letter dated June 19, 1981 (Tr. 175). Service was to commence on October 1, 1981 (Tr. 175). As a result of Gulf's willingness to serve the two new industrial customers, Escambia petitioned the Commission to prevent Gulf from extending its electrical transmission lines into what Escambia considered its territory.

Both Gulf and Escambia provide electrical service to customers in the vicinity of the Blackjack Creek site (Tr. 56). From 1939 until December 1, 1980 Escambia's power was supplied on a wholesale basis by Gulf (Tr. 57, 178,

196). Under the provisions of a wholesale tariff, Escambia was entitled to serve users requiring not more than 300 KVA service, meaning residential and small commercial customers (Tr. 177). In October, 1980 Escambia became a member of Alabama Electric Cooperative (AEC) and its power requirements were then met by AEC rather than Gulf (Tr. 38). However, until December 1, 1980 AEC provided service to Escambia through Gulf (Tr. 57). At the time of the hearing, Escambia served 6,200 customers, although none were being served at 115 KV transmission level (Tr. 41, 67). One of its customers, Exxon Pipeline Company, requiring 75 KVA service, is situated adjacent to the Exxon U.S.A./Air Products, Inc., site (Tr. 45). Gulf's customers surround the

disputed area (Tr. 43) and include five industrial customers, one of whom is Exxon U.S.A. near Jay, Florida (Tr. 194).

The Commission found that the disputed area was much smaller than the area described by Escambia and that the number of customers served by the respective utilities was not a determining factor in this case due to the type of service requested.

Both utilities would need to construct new facilities in order to serve the two new customers (Tr. 117). Gulf intended to construct a 115 KV transmission line from its Humble Oil Substation, 6.75 miles northwest of the site (Tr. 192a).[2] A new substation

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[2]Volume II of the transcript

would be constructed adjacent to the Exxon U.S.A. property (Tr. 192b). The estimated total cost of the right-of-way, transmission line and substation was $1,057,000 (Tr. 193). Gulf would be able to provide permanent service on October 1, 1981 (Tr. 192b).

Escambia alleged in its petition that it could provide the requested service for $1,100,000. At hearing an Escambia witness testified that temporary 46 KV service would be provided from an AEC line 1.25 miles east of the Blackjack Creek site (Tr. 27). Permanent service would be provided by constructing a 115 KV line

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[2](cont'd) contains two pages marked as page 192. For ease of reference the Commission has referred to the first as 192a and the second as 192b.

3 miles to the site from an AEC substation (Tr. 96). In addition to constructing the 115 KV line to the site, AEC would also have to upgrade 30-35 miles of its existing 46 KV line to its substation (Tr. 86, 97) to meet Exxon's service request (Tr. 111-113). It was estimated that construction costs on that project would total three million dollars (Tr. 114). An AEC witness testified that the latter upgrading project had been planned for some time (Tr. 113). At hearing Escambia presented a different estimate for the cost of providing service to the Blackjack Creek site than the figure alleged in its petition. Construction of the temporary line was estimated to cost between $70,000 and $75,000 and cost of the permanent line was estimated to be between $625,000

and $650,000. (Tr. 100). When questioned, Escambia's witness was unable to resolve the inconsistent estimates.

The Commission found that no displacement of Escambia's service would occur as a result of its decision in favor of Gulf. Escambia serves residential and small commercial customers in the area surrounding the Blackjack Creek territory and has only one large user, a school (Tr. 65). Growth in the area is minimal. In 10 years the utility has taken on only 400 new customers (Tr. 67-68). The Commission granted Gulf the authority to serve Exxon U.S.A. and Air Products, Inc., in a very limited area that has been particularly described in its order. The demand for service by these two customers is at a transmission

level of 115 KV, a much greater level of service than Escambia is providing to any of its present customers. No additional territory or customers were awarded to Gulf by the Commission.

On appeal, the Florida Supreme Court found that the record contained competent substantial evidence to support the Commission's findings. 421 So.2d 1384 (Fla. 1982). Additionally, the court held that when no factual or equitable distinction exists in favor of either utility, the territorial dispute is properly resolved in favor of the privately owned utility. This conclusion was specifically held to be consistent with the court's earlier decision in Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc., 122 So.2d 471 (Fla. 1960). In Withlacoochee the court

found that a cooperative was using its preferential economic advantage to serve customers previously being adequately served by an investor owned utility. The dispute was resolved by the court in favor of the investor owned utility. While the facts in Withlacoochee are different from those in the instant case, the principles enunciated by the court apply here: the preferential economic advantage enjoyed by rural electric cooperatives and the fundamental underlying purpose that motivated the establishment of the rural electrification program are legitimate considerations in resolving territorial disputes.

ARGUMENT

This case presents no substantial federal question for review by this Court. The Commission's order, affirmed by the Florida Supreme Court, states that when a decision as to who should serve a large industrial customer must be made and all relevant factors, including those enumerated in Paragraph 366.04(2)(e), Fla. Stat., have been considered and found equal, the investor owned utility should be granted the authority to provide service rather than the cooperative. This policy is constitutionally sound.

The Commission was faced with a statutory obligation to render a decision as to who should provide electrical service in the disputed territory. When it found no equitable or factual distinction in favor of

either utility, it made a policy decision in favor of the investor owned utility. In formulating this policy, the Commission looked at the differences in the financial composition of investor owned utilities and cooperatives. It recognized that cooperatives receive preferential income tax treatment, substantial loans and low loan interest rates. Investor owned utilities, on the other hand, have a capital structure composed of debt and equity, which includes common and preferred stock. Gulf, which does not have access to the low loan interest rates that Escambia does, must pay a higher interest rate for its loans and must pay dividends high enough to attract investors. These higher capital costs increase its financial risk. Because Gulf generates

power as well as delivering it, it also has higher business risk than Escambia, which only delivers power. These considerations are significant enough that when all other factors are equal, the investor owned utility should have the ability to serve the new territory. By awarding the new customer to the utility with greater financial and business risk, the Commission adhered to the mandate of the controlling state statute. This policy clearly has a direct and rational relationship to the state's legitimate interest in assuring "an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities." Paragraph 366.04(3), Fla.

Stat. There has been no violation of the Fourteenth Amendment, but rather the announced policy is in furtherance of the state's legitimate police power, one of the least limitable of governmental powers. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1945).

The Florida Supreme Court has not ruled that cooperatives may not compete with investor owned utilities in rural areas, as Escambia asserts. Rather, the court correctly affirmed relevant statutory and policy considerations that are necessarily applicable whenever a cooperative and an investor owned utility are in direct competition and no significant differences exist to distinguish them from each other.

As for Escambia's position that it provides service in the disputed area

and, therefore, the Commission's decision causes an uneconomic duplication of services, the facts do not support this assumption. Because there are no exceptional circumstances surrounding the findings of fact made by the Commission and affirmed by the court, their rejection by this Court is not warranted. Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

Escambia cites Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir.), cert denied 380 U.S. 815, reh'g denied 385 U.S. 964 (1966), in support of its position that economic competition between rural electric cooperatives and other utilities should be encouraged. That case involved a suit by a privately owned electric utility to enjoin a loan

by the Rural Electrification Administration to an electric cooperative for the construction of facilities. The Fifth Circuit noted in its opinion that no statute or contract existed in this particular case entitling the complaining company to remain free of competition and be the only one of its kind in the territory involved. Because no such right was shown to exist, no property right existed either. The court concluded "that making a loan for the construction of competitive facilities is not a deprivation of property rights guaranteed by the Fifth Amendment." (at 864). As can be seen, this opinion does not stand for the proposition that economic competition should be encouraged between the two types of utilities, but rather, that in the

absence of a statute or contract preventing competition there is no constitutional right to remain free of competition.

In the instant case Paragraph 366.04(3), Fla. Stat., prevents competition by charging the Commission with the duty to assure an adequate and reliable source of energy and the avoidance of an uneconomic duplication of facilities. The Commission's action is consistent with the court's decision in Central Louisiana, contrary to Escambia's assertions.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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